# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1943

## No. 17

JAMES LANIER BELL,

*Petitioner,*

*vs.*

PREFERRED LIFE ASSURANCE SOCIETY OF MONTGOMERY, ALABAMA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

## BRIEF FOR PETITIONER.

WARREN E. MILLER,
*Washington, D. C.;*
R. K. WISE,
*Columbia, S. Carolina;*
R. T. MILNER,
*Wetumpka, Ala.;*
FRED BALL, JR.,
*Montgomery, Ala.;*
R. B. BARNES,
*Birmingham, Ala.;*
W. H. BRANTLEY, JR.,
*Birmingham, Ala.,*
*Counsel for Petitioner.*

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## BRIEF FOR PETITIONER.

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### Opinions Below.

The District Court's opinion appears on pages 165-168 of the record. The opinion of the Circuit Court of Appeals (R. 171-176) is reported in 131 Fed. (2d) 516.

### Question Presented.

Whether the judgment of the Circuit Court of Appeals was correct in holding that the Court was without jurisdiction of the subject matter of this suit.

## Statement.

The District Court in a preliminary hearing on the question of jurisdiction, before trial, considered the amended complaint (R. 133-147) and dismissed this suit upon the ground that the amended complaint failed to state a claim upon which relief, within the jurisdiction of the Court, could be granted.

The Circuit Court of Appeals held (R. 173-176) that this suit was not a class suit but was an individual suit by petitioner in his own behalf only, and affirmed the dismissal for want of jurisdiction, assigning as its reason that the amount in controversy was not within the jurisdiction of the Court.

Petitioner, a citizen and resident of South Carolina, sues respondent, Preferred Life Assurance Society, a corporation organized under the Fraternal Benefit Statutes of Alabama (R. 133) and its officers, directors, and trustees (R. 134-135), residents of Alabama, alleging fraud, mismanagement, unlawful enrichment of certain officers from the trust funds of the Society, seeks to oust the present officers, directors, and trustees and to displace them by competent persons and demands, on behalf of the Society and its members, actual and punitive damages against the officers of $200,000, requests the appointment of a receiver to take charge of and conserve the trust assets of the Society.

The amended complaint avers the Society's assets exceed $1,000,000 and the amount in controversy exceeds $3,000, exclusive of interest and costs.

The Society writes a form of insurance known as "Contingent Endowment Insurance" under a plan whereby (R. 136) all members of the Society are supposed to be divided into groups, called "divisions," each consisting of twenty-five (25) members of the same entry age; in each division

each member is given a position numbered from one (1) to twenty-five (25). When a death occurs in any division the dead member's beneficiary receives the face amount of the dead member's insurance as a death claim, and the living member in good standing in the same division who holds the lowest position collects the face amount of his own insurance as a living-claim, and his certificate is forthwith cancelled. By reason of this contingency of collecting the face amount of insurance while still alive, after no fixed period of time, this form of insurance commands premiums much higher than ordinary insurance.

From the standpoint of the probability of collecting the insurance while the policyholder is still alive, the essence of the contract is that there be at all times twenty-five (25) members in each division. The Society by its contract binds itself to at all times keep and maintain each division at a strength of twenty-five (25) members.

The amended complaint avers on November 10, 1934 (R. 137) respondents' agent solicited petitioner to apply for a certificate of Contingent Endowment Insurance, representing that petitioner would have No. five (5) position in his division; that petitioner would "collect in two (2) years easy"; that "we will fill this group before we start another one"; and that there would be twenty-five (25) members in petitioner's division; and the respondents' agent represented to petitioner that petitioner's division would be completely filled before any memberships were sold in any other divisions of petitioner's age class.

The amended complaint avers that all of these representations, except as to the position offered petitioner in his division were false, were known to be false when made, and uttered with a reckless disregard for the truth. However, petitioner believed these representations to be true, and relying upon them, applied for a certificate of Contingent Endowment Insurance which he would not have applied for

except for such false representations, and respondents issued petitioner a certificate, which petitioner accepted, and upon which he paid premiums in the belief that twenty-five (25) members existed in his division at all times until January, 1940, when petitioner learned that instead of there being twenty-five (25) members in his division, there were only ten (10).

Respondents have never (R. 138) had twenty-five (25) members in any division; have never sold a position number higher than eleven (11); and have no reasonable expectation of ever filling any division, have no intention of so doing, having opened a total of one thousand four hundred fifty-six (1,456) divisions with one thousand four hundred fifty-four (1,454) divisions now open, all of these divisions having been opened prior to July 30, 1931, and long before respondents solicited petitioner to apply for insurance. As of December 31, 1940, respondents' Society had ten thousand two hundred forty-one (10,241) members.

Respondents have made no effort to fill petitioner's division although selling insurance in other divisions at petitioner's entry age. By reason of respondents' breach of their contract, petitioner has been damaged in his opportunity to collect while living on his certificate because it will take years longer for his certificate to mature with only ten (10) members in his division than if there were twenty-five (25) members.

The Society (R. 140) was organized August 28, 1928, as a Fraternal Benefit Society, without capital stock, under the laws of Alabama, and was organized and carried on for the benefit and profit of the respondents, Joseph E. Justice, Spencer H. Longshore and M. M. Longshore, Justice (R. 141) having received approximately $132,000 from the Society over a period of ten (10) years, Spencer H. Longshore having received approximately $339,095 since the Society was organized in 1928, and M. M. Longshore having

received approximately $29,429 from the time of organization until December 15, 1939, these three (3) persons having received approximately $492,521 as of December 31, 1940, or approximately 82.60% of the total claims paid to members over this period.

W. Guy Longshore organized (R. 138) another insurance company in 1936 known as "First National Assurance Society of Atlanta, Georgia," which company writes Contingent Endowment Insurance in competition with the respondent, Preferred Life Assurance Society, W. Guy Longshore continuing as a trustee of Preferred Society and at the same time serving as General Manager of the First National Life Assurance Society with an overwriting contract with that Society, which has a policy list of the Preferred Society, by the use of which list the First National Life Assurance Society has sold more than $500,000 of Contingent Insurance, obtaining business by being able to offer lower position numbers to prospective policyholders than they hold in the Preferred Society. Members of the selling staff of the Preferred Society have taken positions with the First National Society. The respondents, it is averred, have largely abandoned efforts to fill divisions in the State of Georgia, having concentrated on persuading members and non-members of Preferred Society to purchase Contingent Endowment Insurance with First National Society, thereby causing members of the Preferred Society to cease paying premiums in the Preferred Society in order to purchase insurance with the First National Society, this action constituting fraud on petitioner *and all other members of Preferred Society.* (Italics supplied.)

Preferred Society's total income (R. 141) to December 31, 1940, has been approximately $4,128,313 and disbursed in claims over this period approximates $600,185, or approximately 14.55% of its total income.

Petitioner (R. 142) was not informed of the fraternal nature of the Society until 1939 when he began to receive notices of Lodge meetings, there having been no Lodges in existence prior thereto, and no Lodge meetings were held or pretended to be held until 1940, although the Society was chartered in 1928 as a fraternal order.

The Supreme Lodge Meeting in January, 1940 (R. 143) was sham and pretensive in that it neither elected officers and directors nor took other action as to the policy and management of the Society. All elections of directors, trustees and officers have been without the sanction of the Supreme Lodge Meeting (as required by Title 28, Par. 169 (8441) of the Alabama Statutes), (Appendix p. 40).

The overwriting or management contract of Spencer H. Longshore is fraudulent and void, having been entered into without the knowledge, consent, or approval of the Society's membership; and the respondents, Justice, Spencer H. Longshore, M. M. Longshore and W. Guy Longshore, the active officers, directors, trustees and agents of Preferred Life Assurance Society operated for their own personal benefit and not for the benefit of its members, receiving exhorbitant salaries and commissions which have made them wealthy while the members have not received dividends. Respondents deprived petitioner *and other members* of the opportunity to attend Lodge meetings and vote on the officers of the Society and deprived them of control over the actions of such officers. (Italics supplied.)

Respondents (R. 144) did not require petitioner or a great majority of applicants to undergo physical or medical examination when applying for insurance or any other time, as required by the laws of the State of South Carolina, and as a result thereof poor physical risks became members of the Society to the prejudice of petitioner *and all other members* in good health. (Italics supplied.)

This alleged insurance is an illegal lottery, constitutes an illegal scheme to defraud and is a "wagering contract" in that it gives an interest in the lives of persons in whom no insurable interest exists.

Respondents have breached their contract with petitioner *and all other members* by not filling or endeavoring to fill the Society's divisions and have defrauded petitioner *and other members* of the Society by taking the members' money without disclosing this fact (R. 145) thus giving petitioner a right to vindictive damages (under the laws of the States of Alabama and South Carolina). (Italics supplied.)

Petitioner's certificate is in full force and effect and he is interested in having the funds of the Society properly and economically administered; respondents, by reason of the fraud and wrongs perpetrated *upon the Society* and petitioner *and the other members of the Society,* are not fit, proper or competent persons to be entrusted with the management of the insurance of the Society and petitioner is entitled to have them displaced as officers, directors and trustees and to have a receiver appointed to reorganize the Society, preserve its funds for the petitioner and *the other members of the Society,* which funds are a trust fund for the benefit of petitioner and *the other members of the Society;* and petitioner is entitled to a money judgment against the respondents in such sum as may be found upon an accounting *said judgment being for the benefit of the Society and its members,* for the fraudulent and wrongful conduct of said respondents; and petitioner is entitled to have his certificate reformed (R. 146), actual and punitive damages of $200,000 being claimed, and petitioner is entitled to relief by the court for the reason that any attempt to obtain relief within the Society would be futile. (Italics supplied.)

Petitioner asks that the respondent be replaced by other officers, directors and trustees who will be fit and suitable

and regularly elected by the members of the Society, asks a money judgment against each of said officers, directors and trustees in the amount owing from them *to the Society*, and asks that a receiver be appointed to take charge of and conserve the trustee assets, and to reorganize the Society (R. 145). (Italics supplied.)

## Summary of Argument.

### Point One.

**This is a class suit instituted by petitioner for the benefit of himself and all others similarly situated.**

### Point Two.

**The amount in controversy was within the jurisdiction of the court.**

### Point Three.

**The contracts upon which premiums have been paid to create this trust fund were wagering contracts, no insurable interest existing between the policyholders, and therefore contrary to public policy and void.**

### Point Four.

**Upon the facts pleaded, property rights being involved, equity will intervene and the Court should appoint a receiver to take charge of this trust fund of well over a million dollars, now being dissipated, in order that it may be preserved and not wasted; and for the purpose of reorganization.**

### Point Five.

**The action of the court below was contrary to the Act authorizing the New Rules of Civil Procedure and Rules of Civil Procedure 8 (e) (2), 23 (a), and 23 (b), and Rule 18.**

## ARGUMENT.

### Point One.

**This is a class suit instituted by petitioner for the benefit of himself and all others similarly situated.**

Petitioner is suing the officers, directors and trustees on behalf of the Society and other members similarly situated to recover a substantial sum of money which these parties have appropriated to themselves without authority of law. The amended complaint shows that these respondents have been systematically diverting to themselves money properly belonging to the fund which they are administering. Therefore, Preferred Life Assurance Society and its members, including petitioner, have a claim against these officers and directors for such of its assets as have been improperly diverted to themselves. Whether, by reason of their breach of trust they have forfeited their right to compensation must necessarily await an accounting, but clearly the facts as pleaded demonstrate the existence of the claims against these persons.

When, on final hearing at a trial of this cause, it will be demonstrated that these officers, directors and trustees are unfit to manage the Society, the Court will remove these persons, and appoint a receiver of the assets and then displace these persons who were never duly elected, by regularly elected, competent persons.

No claim has yet accrued to petitioner under the terms of his contract because he is still living and in position number four (4) in his class or division. Therefore, he has no *present* claim for any particular amount of money but he does have the right to have his interest in the entire trust fund of well over a million dollars preserved.

Under the Provisions of Section 8485 of the Alabama Code (1923) (Appendix page 41), all the members of the

Society may be required to pay additional assessments in the event the trust fund becomes exhausted. Therefore, at some future date this petitioner, and all other members of the Society, if the trust funds are all wasted, may become liable for a contribution to pay claims.

Section 8444 of the Alabama Code (1923) (Appendix Page 40) provides for extended insurance or paid-up protection when a sufficient reserve has been accumulated with which to pay for it. It will thus be seen that petitioner and the other members of the Society similarly circumstanced have the right to extended or paid-up protection when there is a sufficient reserve accumulated with which to pay for these additional benefits. The money recovered from these officers will make it possible for additional benefits to inure to the benefit of petitioner and the other members.

If these officers are required to replace the money which they have illegally taken from the trust fund, not only will each of the 10,241 members (R. 138) of the Society similarly circumstanced as petitioner benefit, but it would undoubtedly be possible under a reorganization as is sought here, for the Society to convert into a mutual company under Title 26, Section 236 *et seq.* of the Alabama Code, a substantial reserve having been built up for the protection of petitioners and the other members from which they would eventually receive substantial dividends.

A fair reading of this amended complaint clearly shows that it is more than "an individual suit by petitioner on his own behalf" as was held by the Circuit Court of Appeals when it affirmed the action of the trial court, dismissing the suit prior to trial solely upon the basis of the allegations contained in the amended complaint.

The amended complaint avers (R. 143) that respondents have deprived petitioner *and all other members* of their opportunity to attend Lodge meetings, elect and control

the officers of the Society; asks that a receiver be appointed to reorganize the Society, preserve its funds for the benefit of petitioner *and the other members of the Society,* and for judgment for the benefit of *the Society and its members* because of the fraud and wrongs perpetrated *upon the Society,* upon petition *and upon the other members of the Society* (R. 145); and to preserve the funds for the plaintiff *and the other members of the Society;* and for a money judgment against the officers, directors and trustees in the amount found by an accounting in this suit to be owing from them *to the Society.* (Italics supplied.)

It will thus be seen that the amended complaint here by its language clearly shows that this suit is a class suit, both in the specific allegations made and in the prayer for relief. The amended complaint shows that the most important purpose of the suit is for the protection and preservation of the property rights of petitioners and others holding identical policies and similarly circumstanced in a trust fund which is being threatened, depleted and dissipated fraudulently to the irreparable damage of the policyholders having an interest in such fund. They all have a community of interest in this trust fund which was established by the premiums paid by them to the Society; and they each have a common title to the fund here in litigation.

Paragraph 26 of the amended complaint (R. 145) avers that by reason of the fraud and wrongs which the respondents "have perpetrated upon the Society" they are not proper persons to be entrusted with the management of the insurance feature of the Society and they should be displaced as officers, directors and trustees and replaced by fit, competent and suitable persons, regularly elected by the members of the Preferred Life Assurance Society. These respondents were not so elected but usurped the offices which they hold.

The relief prayed for shows that this petitioner is one "as will fairly insure the adequate representation of all" persons in this same class as prescribed by Rule 23 (a); and that "the character of the right sought to be enforced for • • • the class is several" and that here "there is a common question of law and fact affecting the several rights and a common relief is sought," as prescribed by Rule 23 (a) (3) of the Rules of Civil Procedure.

The case of *Boesenberg* v. *Chicago Title & Trust Co.*, 128 F. (2d) 245, (C. C. A. 7), was a case directly in point with the instant suit, where suit was instituted by a representative of a class, beneficiaries of a trust estate in which it was averred that the trustees had been guilty of malfeasance and apparently paid excessive compensation to certain individuals, the relief being sought being restraint of the trustees from further wrongful action, lodgment of the trust estate in a receiver to be appointed by the court, determination of the amount due the estate and its restoration to the fund. In that case, the petitioner's proportionate interest was less than $3,000.00. There, the District Court, believing they had a suit to recover individual amounts due petitioner, dismissed the suit on the ground that the sum due petitioner was less than the requisite amount. The Circuit Court of Appeals reversed, holding that the jurisdiction is tested by the value of the object sought to be gained by the suit, holding that it was apparent that the subject of the controversy was the protection, preservation and administration of a trust estate worth far more than $3,000.00. That court held:

> "Inasmuch therefore as plaintiff sought to have the court take jurisdiction of a trust fund aggregating more than $70,000 in value; to have restored to that fund sums aggregating some $30,000 alleged to have been wrongfully diverted and to have the estate administered in court, it is apparent that the subject

of controversy was not the recovery of plaintiff's interest in the trust fund but the protection, preservation and administration of a trust estate worth far more than $3,000, under the well known powers of a court of equity. Such is a true class suit, which may be maintained by "one or more" of the class, Rule 23, Rules of Civil Procedure, 28 U. S. C. A. following section 723c; *United States* v. *'Old Settlers'*, 148 U. S. 427, 13 S. Ct. 650, 37 L. Ed. 509; *Weeks* v. *Bareco Oil Co.*, 7 Cir., 125 F. 2d 84."

The action of the Court below was contrary to this decision of the Seventh Circuit Court of Appeals.

Paragraph 15 (R. 171) of the amended complaint filed herein shows that the respondent Society had 10,241 members as of December 31, 1940. This shows that the "persons constituting a class are so numerous as to make it impracticable to bring them all before the court" (as stated in Rule 23 (a)); and the relief herein prayed for shows that this petitioner is one who will "fairly insure the adequate representation of all" and that "the character of the right sought to be enforced for * * * the class is several," "and there is common question of law or fact affecting the several rights and a common relief is sought," all as permitted by Rule 23 (a) of the Rules of Civil Procedure.

Paragraph 26 of the amended complaint (R. 178) shows that petitioner is seeking to have a receiver appointed to reorganize the Society and preserve its assets for petitioner and other members of the Society, and states:

"* * * by reason of the fraud and wrongs *which they* (the respondents) *have perpetrated upon the Society*, as hereinabove set forth, are not fit, proper or competent persons to be entrusted with the management of the insurance feature of the Society; and plaintiff is entitled to have them displaced as officers, directors and trustees, and replaced by fit, competent and

suitable persons and in the meantime is entitled to have a receiver to reorganize the Society, to take charge of the insurance department of the Society, and preserve the funds of the same for the benefit of plaintiff *and the other members of said Society, said funds being a trust fund for the benefit of plaintiff and the other members of the Society;* and plaintiff is further entitled to a money judgment against the defendant officers, directors and trustees, and each of them in such sum of money as may be found proper and just upon an accounting being had of said officers, directors and trustees, *said judgment being for the benefit of the Society and its members,* for the fraudulent and wrongful conduct of its officers, directors and trustees." (Italics supplied.)

The amended complaint (R. 179) asks judgment:

1. For damages in the sum of Two Hundred Thousand ($200,000.00) Dollars.
2. That the respondent officers, directors and trustees be displaced by others who will be fit and suitable and regularly elected *by the members of Preferred Life Assurance Society.* (Italics supplied.)
3. That a receiver be appointed to take charge of and conserve the assets of the insurance department of said Society, the same being trust assets.
4. For a money judgment against each of said officers, directors and trustees in such sum, or sums, as shall be found to be justly due and owing from each of said officers, directors and trustees *to the Society.*
5. For the costs and disbursements of this action.

In Dean Clark's discussion of Rule 23 (b), at page 73 of the Washington Institute Proceedings on the Federal Rules of Civil Procedure, the following appears:

"Here is another question: 'Is it permissible to join in a stockholders' suit an individual claim of the plaintiff-stockholder against the corporation?' There is

considerable explanation of a particular situation but I will mention it generally because the answer, so far as I can see is, 'Why not?' The provision for the stockholders' suit in Rule 23 (b) is a rather specialized case which, of course, goes back to the equity rule. Even though that is a specialized case, our general rule of unlimited joinder could apply. The only limitation in the joinder of parties is that of the common question of law or fact. The rules of practically unlimited joinder would, I think, permit the joinder here."

The action of the Court below is not only contrary to these Rules of Civil Procedure, but also contravenes the organic statute authorizing said Rules [1] as the Court below has clearly abridged and denied petitioner's substantive rights.

Clearly, this is a class suit in addition to being an individual suit by the petitioner Rule 8 (e) (2) permits alternate claims in one count as this was pleaded.[2] If one of such statements, made independently, is sufficient, the pleading is certainly not made insufficient by the other statement. Further, the amended complaint here adequately sets forth a secondary action by a shareholder under Rule 23 (b) of the Rules of Civil Procedure.[3]

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[1] Act of June 19, 1934, c. 651, par. 2, 48 Stat. 1064, U. S. C. A. Title 28, par. 723b, 723c, which provides: "• • • said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."

[2] Rule 8 (e) (2) provides: "A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. • • •"

[3] Rule 23 (b) provides: "In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be

Petition avers (R. 146) that any attempt to obtain relief within the Society would be futile, and otherwise brings this action within the requirements of Rule 23 (b). There is most assuredly no collusion, for the defendant officers and trustees cannot by the wildest flight of fancy be supposed to have conspired with petitioner to bring suit on behalf of the Society against themselves, and the same is true with regard to no demand having been made. Circumstances as well as direct allegation can demonstrate that there is no collusion and that a demand would be futile. It was well said in the strikingly similar case of *Haynes* v. *Fraternal Aid Union* (D. C. Kan., 1929), 34 F. 2d 305, 308, where petitioners demanded an accounting from certain officers and directors of a fraternal benefit society who were alleged to be using the Society's assets for their own benefit:

> "Objection is made because the plaintiffs did not apply to the directors and ask them to have the corporation sue themselves. Such a demand, being manifestly useless, is unnecessary. The directors cannot be both plaintiffs and defendants, nor defendants and judges." 34 F. 2d 305 at 308.

It is thus apparent that petitioner has brought himself within all the requirements of Rule 23 (b).

Rule 23 (b) by its terms applied only to a suit by a shareholder against a corporation in which he owns stock, a situation where the fiduciary relationship between the stockholder and the directors is less marked. Petitioner and

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verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort."

other members of the Society are *cestuis que trustent;* and in Alabama the corporate entity of a fraternal benefit society such as this is but another name for a trust fund. Therefore, we think that Rule 23 (b) is not applicable under the circumstances in this case merely because this trust fund has a corporate name and entity.

The court below ignored the applicable provisions of Rules 8 (e) (2)[4] 23 (a),[5] and 23 (b)[6]; and its decision was contrary to the organic statute creating these Rules.[6]

Further, under Rule 18, Rules of Civil Procedure,[7] a complaint may contain as many independent or alternate claims as one may have against a party.

## Point Two.

**The amount in controversy was within the jurisdiction of the court.**

The amount in controversy includes the $200,000 punitive damages, which are allowable by the law of Alabama as well as by the law of South Carolina.

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[4] See footnote 2, page 12.

[5] Rule 23 (a) provides: "If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

[6] See footnote 1, page 12.

[7] Rule 18. Joinder of Claims and Remedies. (a) Joinder of Claims. The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party.

Whenever there is a gross fraud, or an actual intent to deceive, the better authorities permit the recovery of punitive damages in tort actions for fraud and deceit, and such is the law both in Alabama and in South Carolina. *Southern Bldg. & Loan Assn.* v. *Bryant* (1932), 225 Ala. 527, 144 So. 367; *Southern Bldg. & Loan Assn.* v. *Dinsmore* (1932), 225 Ala. 550, 144 So. 21; *Fidelity-Phenix Fire Ins. Co.* v. *Murphy* (1933), 226 Ala. 226, 146 So. 387; *Cartwright* v. *Hughes* (1933), 226 Ala. 464, 147 So. 399; *Crosby* v. *Metropolitan Life Ins. Co.* (1932), 167 S. C. 255, 166 S. E. 266; *Cook* v. *Metropolitan Life Ins. Co.* (1938), 186 S. C. 77, 194 S. E. 636 *supra*. In the case at bar there is a very gross fraud practiced upon petitioner with actual intent to deceive him, and his claim for punitive damages is maintainable in the Courts both of Alabama and of South Carolina. In such case, the punitive damages are added to the actual damages to make up the jurisdictional amount. *Young* v. *Main* (8 Cir., 1934), 72 F. 2d 640; *Greene* v. *Keithley* (8 Cir., 1937), 86 F. 2d 238. The Court below, in failing to consider punitive damages, was in error.

In the case of *St. Paul Indemnity Co.* v. *Cab Company*, 303 U. S. 289, cited by the Circuit Court of Appeals (R. 175) as its authority to dismiss this action, this court, in holding that the petitioner there was entitled to invoke the jurisdiction of a Federal Court, at page 288 held:

> "The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls (citing *Wilson* v. *Daniel*, 3 Dall. 401, 407, 408; *Barry* v. *Edmunds*, 116 U. S. 550; *Sherman* v. *Clark*, 3 McLean 91, Fed. Cas. 12763; *Stuckert* v. *Alexander*, 4 F. Supp. 172) if the claim is apparently made in good faith (citing *Peeler* v. *Lathrop*, 48 Fed. 780; *Ung Lung Chung* v. *Holmes*, 98 Fed. 323; *Washington County* v. *Williams*, 111 Fed. 801; *Greene County Bank* v. *Teasdale Comm'n Co.*, 112 Fed. 801; *American Sheet*

*& Tin Plate Co.* v. *Winzeler*, 227 Fed. 321; *Owen M. Bruner Co.* v. *O. R. Manefee Lumber Co.*, 292 Fed. 985; *Walker Grain Co.* v. *Southwestern Tel. & Tel. Co.*, 10 F. (2d) 272). It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal."

The court below, we respectfully submit, misapplied the law as announced by this Court in the above decision, to the facts as set forth in the amended complaint filed in this case. There is no legal certainty here that the claim is for less than the jurisdictional amount; and hence the courts below were wrong in dismissing this cause.

The jurisdictional amount is not in any case to be determined by the result of a finding or verdict or by the ultimate result of an accounting, but by the good faith and reasonableness of the allegation that over $3,000 is involved. It is not the amount that petitioner is able to prove he is entitled to that determines the amount in dispute for the purpose of jurisdiction, for otherwise the failure of a petitioner to recover would oust the court of jurisdiction. The amount in dispute or the matter in controversy which determines the jurisdiction of the Circuit Court in suits for the recovery of money only, is the amount demanded by the petitioner in good faith." *Peeler* v. *Lathrop*, 48 Fed. 780, (C. C. A. 5th); *Gordon* v. *Longest*, 16 Pet. 97, 10 L. Ed. 900; *Smith* v. *Greenhow*, 109 U. S. 669, 27 L. Ed. 1080; *Barry* v. *Edmunds*, 116 U. S. 550, 29 L. Ed. 729; *Jones* v. *McCormick Harvesting Machine Co.*, 82 Fed. 295 (C. C. A. 7); *Central Commercial Co.* v. *Jones Dusenbury Co.*, 215 Fed. 13 (C. C. A. 7); *Operators' Piano Co.* v. *First Wisconsin Trust Co.*, 283 Fed. 904 (C. C. A. 7).

Even if the instant suit should be construed as one for money only, the Court already had jurisdiction, under the authority heretofore cited. It alleges facts authorizing other relief of which the Court has jurisdiction.

In a stockholder's derivative action to require the corporation to enforce a right existing in its favor, the amount in controversy is measured by the amount of the corporation's claim. *Haynes* v. *Fraternal Aid Union* (D. C. Kan., 1929), 34 F. 2d 305 and 308; *Johnson* v. *Ingersoll* (7 Cir., 1933), 63 F. 2d 86, at 87; *Marion Mtge Co.* v. *Edmunds* (5 Cir., 1933), 64 F. 2d 248 (at 252). In the case at bar the allegation is that respondent officers and directors have misappropriated to their own use funds of the Society amounting to several hundred thousand dollars, for which an accounting and money judgment is sought.

Petitioner became a member of the Society in November, 1934. The respondent Spencer H. Longshore has received from the Society monies aggregating $128,000 during 1938, 1939 and 1940; and the respondents Joseph H. Justice and M. M. Longshore have each received more than $3,000 since 1934. Even if the Court should not hear petitioner to complain of monies received by respondents prior to November, 1934, he can unquestionably complain of the continuance of conditions which first came into being prior to 1934, and there is in controversy a sum many times $3,000 and received since 1934.

Petitioner's theory of the case, fully supported by his averments, is that respondents have, from the inception of the trust, breached their duty towards their *cestuis* in so many ways involving moral turpitude that they have forfeited all right to compensation. Hence the amount in controversy is the full amount received by respondents from Preferred, a matter of several hundred thousand dollars. Even if upon an accounting they should establish a right of reasonable compensation, so that the demand would fall below $3,000 (an almost impossible situation if petitioner is able to prove any part of his charges), the jurisdiction is not defeated.

If the case be considered as one to require trustees to account, the rule is the same as where a right exists in favor of a corporation, for the amount in controversy is not petitioner's individual interest in the fund, but rather the amount in which the trustee is indebted to the fund. Thus, in either view, the amount in controversy in petitioner's third claim for relief far exceeds $3,000, exclusive of interests and costs.

The amount in controversy is the amount of Preferred's assets, over one million ($1,000,000) dollars. Petitioner has demonstrated that his amended complaint states a claim upon which relief can be granted for the reorganization of the Society, together with a temporary receiver to conserve its insurance assets pending such reorganization, because of the acts of the officers and directors in breach of their trust and in opposition to the interests of the *cestuis que trustent.* It remains only to show that the amount in controversy on that claim is measured by the insurance assets of the Society, the same constituting a trust fund brought into Court and exceeding $1,000,000.

Damage to petitioner's individual right to have the Society's assets honestly administered enables him to bring the fund into Court, where any relief he may obtain will benefit all other members of the Society as well as petitioner himself. His action, then, is a true class action even though he does not formally allege that it is brought for the benefit of himself "and all others similarly situated." *Grand Lodge* v. *Shorter* (1931), 219 Ala., 293, 122 So. 36, *supra; Ex parte Rowley* (1942), 20 S. E. 2d 383.

The test of the amount in controversy is the value of the right to be protected,[8] and the settled rule in class suits is that "the aggregate interests of the whole class and not

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[8] *McNutt* v. *General Motors Acceptance Corp.* (1936), 298 U. S. 178, at 181, 80 L. Ed. 1135, 56 S. Ct. 780, at 781, and citations therein; *Electro Therapy Products Co.* v. *Strong* (9 Cir., 1936), 84 F. 2d 766.

the several interests of each individual constitute the matter in dispute." *Local No. 7 of Bricklayers' Union* v. *Bowen* (D. C. Texas, 1922), 278 Fed. 271, at 272.

Petitioner's action is, as shown by the Alabama decisions above cited, a class suit. Application to his action of the principle that the amount in controversy is tested by the aggregate interests of the whole class demonstrates that the amount here in controversy exceeds $1,000,000, since the class consists of all the members (more than 10,000) and their aggregate interest extends to the entire insurance assets of Preferred, such assets constituting the fund which petitioner desires to bring into Court.

Agreeably to the foregoing principles, it has been uniformly held that in an action by a stockholder seeking to administer the corporation's assets, the amount in controversy is the amount over which petitioner seeks to gain control—the entire assets of the corporation. *Towle* v. *Am. Bldg. Loan & Investment Soc.* (C. C. Ill., 1894), 60 Fed. 131; *Taylor* v. *Decatur Mineral & Land Co.* (C. C. Ala., 1901), 112 Fed. 449; *Klein* v. *Wilson & Co.*, (D. C. N. J. 1925), 7 F. 2d 772; *Kelly* v. *Alabama-Quenalda Graphite Co.* (D. C. Ala., 1929), 34 F. 2d 790; *King* v. *Kansas City Police Relief Ass'n* (D. C. Mo., 1932), 60 F. 2d 547. See, also, *Dill* v. *Supreme Lodge* (D. C. Mo., 1915), 226 Fed. 807, where it was apparently assumed that in a suit somewhat like the present one the amount in controversy was measured by the assets of the defendant, Supreme Lodge.

The decision of the court below is contrary to the decisions of the Eighth Circuit Court of Appeals in the cases of *Greene* v. *Keithley*, 86 F. (2d) 238 and *Young* v. *Main*, 72 F. (2d) 640, which cases held that exemplary damages may be added to actual damages to make up the federal jurisdictional amount where exemplary damages, as here, are permitted to be recovered.

The amended complaint alleges (R. 147) the Society's total income has been over four million dollars; that three officials, including a man and wife, received approximately $492,000, which is 82.6 per cent of the total claims paid by the Society until December 31, 1940, and other defendants received from the Society other substantial amounts, all in excess of the statutory limitations. The sworn answers to interrogatories show an income of $4,128,331.86 (R. 147) and that three officials actually received $492,520.76 from the Society, Spencer H. Longshore and wife alone receiving $368,523.41 (R. 147). Since 1936, Spencer H. Longshore has also been a trustee in the First National Life Assurance Society, a competitor.

In the case of *Young* v. *Main* (C. C. A. 8), 72 F. (2d) 640 (at page 643), the court said:

> "It is true that exemplary damages may be added to actual damages to make up the federal jurisdictional amount where exemplary damages are permitted to be recovered, *Scott* v. *Donald*, 165 U. S. 58, 89, 17 S. Ct. 265, 41 L. Ed. 632; and exemplary damages may be allowed in actions on the case of conspiracy or deceit, *Alexander* v. *Staley*, 110 Iowa 607, 81 N. W. 803; *Day* v. *Woodworth*, 13 How. 363, 14 L. ed. 181, 17 C. J. 977."

In the case of *Greene* v. *Keithley*, 86 F. (2d) 238, at page 241, the court said:

> "We think the proper rule is that exemplary damages may be recoverable in tort actions based upon conspiracy or deceit. In the leading case of *Day* v. *Woodworth*, 13 How. 363, 371, 14 L. ed. 181, the Supreme Court laid down the rule as follows: 'It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of

compensation to the plaintiff. This rule has not been qualified or limited, but has been followed consistently by the Supreme Court. *Scott* v. *Donald,* 165 U. S. 58, 88, 17 S. Ct. 265, 41 L. Ed. 632; *Lake Shore & M. S. Ry. Co.* v. *Prentice,* 147 U. S. 101, 107, 13 S. Ct. 261, 37 L. Ed. 97; *Denver & Rio Grande Railway Co.* v. *Harris,* 122 U. S. 597, 609, 7 S. Ct. 1286, 30 L. Ed. 1146; *Barry* v. *Edmunds,* 116 U. S. 550, 562, 6 S. Ct. 501, 29 L. Ed. 729. Actions in tort based on conspiracy or deceit are within this rule since they are actions on the case for torts.' "

The Preferred Life Assurance Society does not require its applicants before membership to undergo any physical or medical examination at the time insurance is applied for, and contrary to the provisions of the South Carolina statute which requires this. Thus poor physical risks become members of the Society to the prejudice of petitioner and to "*all other members in good health*" (R. 144), and the alleged insurance practice being followed is a scheme amounting to illegal lottery and constitutes an illegal and unlawful scheme to defraud, is also a wagering contract in that it attempts to give a beneficial interest to petitioner in the lives of the other members of his division in whom he has no insurable interest and as to whom he does not belong in the class of beneficiaries of fraternal beneficial insurance policies permitted by the statutes of the State of Alabama and South Carolina (R. 144). The Society has defrauded petitioner and the other members of the Society by continuing to accept their money without making disclosure that it was not endeavoring to fill the divisions of the Society.

In the instant case the amended complaint alleges that the Society was not organized "for the mutual benefit of its members and not for a profit" but that it was carried on for the particular benefit and profit of the respondents (R.

140-143); that it conducted its business contrary to the statutes of the State of South Carolina requiring medical examination and that three of the respondents conceived, put into operation and actively participated in and still participate in certain frauds.

The complaint also alleges facts showing deceit (R. 145) in addition to the above mentioned conspiracy.

It will thus be seen that the complaint alleges conspiracy, deceit and fraud and the decision of the Court below in the instant case is clearly contrary to the decision of the Seventh Circuit Court of Appeals in the case of *Boesenberg* v. *Chicago Title & Trust Co.*, 128 F. 2d 245, and is also contrary to the decisions of the Eighth Circuit Court of Appeals in the cases of *Young* v. *Main*, 72 F. 2d 640 and *Greene* v. *Keithley*, 86 F. 2d 238.

The action of the court below in not adding exemplary damages to actual damages to make up the federal jurisdictional amount of three thousand dollars where exemplary damages are permitted to be recovered, as was the case here under the decisions of the courts of Alabama and South Carolina,[9] was contrary to the decision of this Court in the case of *Scott* v. *Donald*, 165 U. S. 58, 89, 17 S. Ct. 265, 41 L. Ed. 632.

The court below ignored the rule that exemplary damages may be recovered in tort actions based upon fraud, conspiracy or deceit as was announced by this court in *Day* v. *Woodworth*, 13 How. 363, 14 L. Ed. 187, wherein this Court said:

> "It is a well-established principle of the common law, that in actions of trespass and all actions on the

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[9] *Southern Bldg. & Loan Assn.* v. *Bryant* (1932) 225 Ala. 527, 144 So. 367; *Southern Bldg. & Loan Assn.* v. *Dinsmore* (1932) 225 Ala. 550, 144 So. 21; *Fidelity-Phenix Fire Ins. Co.* v. *Murphy* (1933), 226 Ala. 226, 146 So. 387; *Cartwright* v. *Hughes* (1933) 226 Ala. 464, 147 So. 399; *Crosby* v. *Metropolitan Life Ins. Co.* (1932) 167 S. C 255, 166 S. E. 266; *Cook* v. *Metropolitan Life Ins. Co.* (1938) 186 S. C. 77, 194 S. E. 636.

case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff."

This rule has not been qualified or limited but has been followed consistently by this court. *Scott* v. *Donald*, 165 U. S. 58, 88, 17 S. Ct. 265, 41 L. Ed. 632; *Lake Shore & M. S. R. Co.* v. *Prentice*, 147 U. S. 101, 107, 13 S. Ct. 261, 37 L. Ed. 97; *Denver & Rio Grande Railway Co.* v. *Harris*, 122 U. S. 597, 609, 7 S. Ct. 1286, 30 L. Ed. 1146; *Barry* v. *Edmunds*, 116 U. S. 550, 562, 6 S. Ct. 501, 29 L. Ed. 729.

In *Barry* v. *Edmunds*, 116 U. S. 550, it was held that a suit cannot properly be dismissed by a Circuit Court of the United States as not substantially involving a controversy within the jurisdiction of the court, unless the facts, where made to appear on the record, create a legal certainty of that conclusion; that where exemplary damages beyond the sum necessary to give a Circuit Court of the United States jurisdiction are claimed in an action for a malicious trespass, the Court should not dismiss the case for want of jurisdiction simply because the record shows that the actual injury caused to the petitioner by the trespass was less than the jurisdictional amount.

The inability of petitioner to recover an amount adequate to give the Court jurisdiction does not show his bad faith or oust the jurisdiction. *Smithers* v. *Smith*, 204 U. S. 632, 51 L. Ed. 636, 27 S. Ct. 297; *Holden* v. *Utah & M. Machinery Co.* (C. C.) 82 F. 209; *Maffet* v. *Quine* (C. C.) 95 F. 199; *Kunkel* v. *Brown* (C. C. A. 4th) 99 F. 593; *Ung Lung Chung* v. *Holmes* (C. C.) 98 F. 323, *supra*; *Washington County* v. *Williams* (C. C. A. 8th) 111 F. 801, *supra*; *Denver City Tramway Co.* v. *Norton* (C. C. A. 8th) 141 F. 599; *Hampton Stave Co.* v. *Gardner* (C. C. A. 8th) 154 F. 805, *supra*; *O. J. Lewis Mercantile Co.* v. *Klepner* (C. C. A. 2d) 176 F. 343; *St. Tammany*

*Bank & T. Co.* v. *Winfield* (C. C. A. 5th) 263 F. 371; *Ragsdale* v. *Rudich* (C. C. A. 5th) 293 F. 182; *Walker Grain Co.* v. *Southwestern Teleg. & Teleph. Co.* (C. C. A. 5th) 10 F. (2d) 272, *Kimel* v. *Missouri State L. Ins. Co.* (C. C. A. 10th) 71 F. (2d) 921; *Simecek* v. *United States Nat. Bank* (C. C. A. 8th) 91 F. (2d) 214.

It will thus be clearly seen that the court below erred in holding the amount in controversy was not within the jurisdiction of the Court.

POINT THREE.

**The contracts upon which premiums have been paid to create this trust fund were wagering contracts, no insurable interest existing between the policyholders, and therefore contrary to public policy and void.**

The insurance involved here is similar to that in the following cases where several contracts were held to be wagering contracts: *Helmetag* v. *Miller*, 76 Ala. 183, 52 Amer. Rep. 316; *White* v. *Equitable N. Ben. Union*, 76 Ala. 251, 52 Am. Rep. 325; *Colgrove* v. *Lowe*, 343 Ill. 360, 175 N. E. 569; *Knott* v. *State ex rel: Guaranty Income Life Ins. Co.*, 136 Fla. 184, 186 So. 788, 121 A. L. R. 715; *Commercial Travelers' Insurance Company* v. *Carlson* (Utah Supreme Court, May 12, 1943), 137 Pac. (2d) 656; *Warnock* v. *Davis*, 104 U. S. 775, 26 L. Ed. 924; *Unity Life* v. *Beasley*, 64 Ga. App. 277.

The policies involved in the cases of *Knott* v. *State, supra*, and *Commercial Travelers' Insurance Company* v. *Carlson, supra*, were practically identical with the form of policies involved in this case.

In *Knott* v. *State, supra*, it was held that a "special endowment benefit" provision of an endowment policy was contrary to public policy as a wagering contract, since under such provision a policyholder would profit by the

death of other policyholders in his class, in whose lives he had no insurable interest. The provision in question was for payments in addition to the face amount payable on the death of the insured or upon his reaching a specified age; and was to the effect that all the policyholders of the same entry age to whom policies were issued in the same calendar year should constitute a special class, upon the death of any member of which, an amount equal to the face amount of such member's policy should be distributed among the surviving members of the class, including the beneficiary of such deceased member, in proportion to the face amount of their respective policies.

At the time the question was raised as to the form of policy involved in the Florida case of *Knott* v. *State, supra,* there was a statute in Florida practically the same as the statute of Alabama, giving to fraternal benefit societies the right to fix classes and provide benefits from special funds to the oldest member of the class upon death of another member, as the Court in its opinion states:

> "We hold a wagering contract is against the public policy of the State of Florida despite Chapter 17947, Acts of 1937, giving to fraternal benefit societies the right to fix classes and provide benefits from special funds to the oldest member of the class upon death of another member."

In the case of *Commercial Travelers' Insurance Company* v. *Carlson* (Utah Supreme Court, May 12, 1943), 137 Pac. (2d) 656, the Court describes the policy involved as follows:

> "The challenged policy form provides that respondent will pay the face amount thereof (A) To the insured upon the maturity of the policy as a mortality endowment as defined in the policy; or (B) to a named beneficiary upon the death of the insured before the maturity of the policy as a 'mortality endowment'. It also provides that if the stipulated premiums are paid for

a full twenty years' period prior to the maturity of the policy either as a 'mortality endowment' or by reason of death of the insured, the insured may surrender the policy and receive a fully paid-up policy for the face amount of the surrendered policy. In brief, the policy is the standard limited payment life insurance policy with the 'mortality endowment' feature. Consequently, the sole question presented is whether the inclusion of the last named feature of the policy justified the refusal by the Commissioner to authorize its issuance in this state.

The 'mortality endowment' provision is integrated with the other provisions. It is not added optionally by payment of an additional premium as in the case of double indemnity and disability provisions in the standard form of life insurance policies. One premium covers all of the insurance features and provisions. Each application for a 'Dual-Pay' policy is stamped with the day, hour and minute it is received at the home office of the company, and the policy is automatically classified into the age group of the applicant. Various divisions are established by the company for each age group, and there are 26 numbers in each of such divisions represented by the letters of the alphabet. For instance, the company assigns the first application to the first number or the 'A' position in the first division of the age group, and thereafter subsequent applications are assigned to the divisions containing the fewest number of policies until all the divisions are filled.

The 'mortality endowment' provision specifies that the 'policy shall mature as a mortality endowment and shall be payable when it becomes the oldest policy in force in its division and the company experiences a mortality loss under another policy in the same division'. For example, if in division 1 policyholder numbered B or any other letter other than A dies while his policy, as well as that of A, are in good standing, the face amount of the policy issued to B or such other person in the group who dies is paid to his beneficiary, and in addition thereto, A's policy being the 'oldest'

in that division immediately matures as a 'mortality endowment' and he is paid in cash the face amount of his policy even if he has paid only the first premium because the death of some other member of the group occurs before the second premium is due. The policy of A matures by the death of another in his division, and payment of the face amount thereof discharges the obligation of the insurer, and consequently A is no longer a policyholder after such payment. Upon B's death, A being eliminated by payment, C would move into the position of A, and other policies would be sold to fill up the group."

The Court further in its opinion says that it is conceded by respondents that the insured in a senior position in any division has no insurable interest in the life of an insured who occupies a junior position, but contend that such fact is wholly immaterial. The Court in answer to such contention states that there is this substantial and controlling difference:

"That No. 1 who holds the 'A' position, as hereinabove indicated, has paid an ascertainable premium in return for the promise of the insurer to pay a stipulated sum upon the death of another person in a group of which he is a member; and that No. 1 has no insurable interest in the life of such junior member of the group. The probabilities are that he may not even be acquainted with the one who dies. The mere fact that such a promise is denominated a 'mortality endowment' does not at all obscure the essence of this provision of the contract: A is the beneficiary of insurance on the life of another in which he has no insurable interest. This being so, we are confronted with a salutory rule, the following statement of which we approve: The 'almost universally accepted rule is that a party insuring a human life must have an insurable interest therein if the insurance is effected for his own benefit, or the policy will be void; and he must prove such interest in order to recover, since public policy does not permit

one having no insurable interest to procure a policy of insurance upon the life of a human being, and pay the premiums as a speculation, or on a chance of collecting the insurance money.' I. Couch, Cyclopedia of Insurance Law, Sec. 295, pages 769-770.

"It is true in one sense, as asserted by respondent, that the holder of the 'A' or No. 1 position in a group does not 'insure' the life of any other person. That is, the premium paid is not to assure him against a pecuniary loss occasioned by the death of another. Absent an insurable interest he could suffer no such loss by the death of such other person. To say that under the provision here considered, No. 1 'insures' the life of no one, merely serves to accentuate the gambling nature thereof and to emphasize that it does not constitute legitimate insurance.

"In another aspect, also, as pointed out by appellant, the issuance of this type of policy involves at the outset a kind of lottery. When an application therefor is received by the insurer, it is given an advantageous or disadvantageous position, depending on the number and automatic allocation of previously received applications. The applicant pays the charge made for the mortality endowment feature for the promise of the insurer to pay a stated sum upon the happening of the contingency provided for, plus the promise to assign the policy to that place of preference or disadvantage in a division which is determined by the fortuitous circumstance that in one of the divisions there is or is not a senior position unfilled."

The Court further states:

"In support of their contention that the 'Dual-Pay' policy does not offend against public policy as a wagering contract, respondent refers us to cases dealing with the tontine or semitontine plan of insurance. Under such plan no accumulations or earnings are credited to the policy unless it remains in force for the tontine period of a specified number of years. Thus, those who survive the period and keep their policies in force

share in the accumulated fund. Those who die or who permit their policies to lapse during the period do not, neither do their beneficiaries participate in such accumulations. See *Gourley* v. *Northwestern Nat. Life Ins. Co.* 94 Okl. 46, 220 P. 645; *Uhlman* v. *New York Life Ins. Co.* 109 N. Y. 421, 17 N. E. 363; *Pierce* v. *Equitable Life Assurance Society*, 145 Mass. 56, 12 N. E. 858; *Equitable Life Assurance Society* v. *Winn* 137 Ky. 641, 126 S. W. 153; and *United States Life Ins. Co.* v. *Spinks*, 126 Ky. 405, 103 S. W. 335.

"It is obvious that such a plan differs in essentials having a direct bearing on the wagering nature of the contract, from the policy here involved; (1) On issuance of a tontine policy no lottery feature is involved—no preferred position is accorded any policy holder. (2) The death of no policy holder is necessary in order that a survivor of the period shall share in the accumulated fund. (3) If any advantage accrues to the survivor because of the non-survivial of another or others, thereby leaving fewer to share therein, such advantage accrues equally to all survivors, not only by virtue of having survived those deceased, but by virtue also of having survived as a policy holder to the end of the stipulated period.

"We conclude that the 'mortality endowment' provision of the 'dual-pay' policy for the reasons herein stated, is a wagering contract. See to the same effect, although dealing with insurance policies which differ in detail for the 'Dual-Pay' policy, *Colgrove* v. *Lowe* 343 Ill. 360, 175 N. E. 569; and *Knott* v. *State ex rel Guaranty Income Life Ins. Co.*, 136 Fla. 184, 186 So. 788, 121 A. L. R. 715. The Constitution of Utah, Art. VI, Sec. 28 provides: 'The Legislature shall not authorize any game of chance, lottery or gift enterprise under any pretense or for any purpose'. In view of such declaration of public policy and in view of the fact that the wagering here involved is on human life, we are compelled to hold that the questioned provision is against public policy and that appellant's action in refusing a permit for its issuance in this state, should

be upheld. See *State et al.*, v. *Russel Inc.*, 101 Utah 89, 118 P. (2d) 679."

Mr. Justice Field, speaking for this Court in *Warnock* v. *Davis*, 104 U. S. 775, 26 L. Ed. 924, in which an assignment of the policy by an insured to one having no insurable interest was held to be a wagering contract and against public policy, says:

> "The policy executed on the life of the deceased was a valid contract and as such was assignable by the assured to the Trust Association as security for any sums lent to him, or advanced for the premiums and assessments upon it. But it was not assignable to the Association for any other purpose. The Association had no insurable interest in the life of the deceased, and could not have taken out a policy in its own name. Such a policy would constitute what is termed a wager policy, or a mere speculative contract upon the life of the assured, with a direct interest in its early termination."
>
> "It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest, arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation; for a parent has an insurable interest in the life of his child, and a child in the life of his parent, a husband in the life of his wife, and a wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful—as operating more efficaciously—to protect the life of the insured than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or

affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They are, therefore, independently of any statute on the subject, condemned, as being against public policy."

The parties to a contract of insurance cannot even by a solemn agreement, override the public policy which requires the beneficiary to have an insurable interest.

In *Colgrove* v. *Lowe*, 343 Ill. 360 (certiorari denied, 284 U. S. 639) which was a case in which a certain number of persons take out life insurance on their own lives, designating the same trust company as a common beneficiary trustee, under an agreement whereby in the event of death within five years 25 per cent of the face amount of the insurance shall be divided for the benefit of such surviving parties to the contract as have kept their insurance in force, the remaining 75 per cent interest in the insurance to be paid to a designated beneficiary, in holding the contract was a wager upon the lives of others in whom the parties to be benefited had no insurable interest, the Court said (at page 363):

"Public policy has universally found expression in judicial decisions refusing to allow life insurance to be taken out in the first instance by persons having no interest in the life of the insured. In accordance with these decisions it has been uniformly held that a contract of insurance upon a life in which the insurer has no interest is a pure wager, that gives the insurer a sinister counter-interest in having the life come to an end. Mr. Justice Holmes in the case of *Grigsby* v. *Russell*, 222 U. S. 149, said: 'The very meaning of an insurable interest is an interest in having the life continue. * * * Indeed, the ground of the objection to life insurance without interest, in the earlier English

cases, was not the temptation to murder but the fact that such wagers came to be regarded as a mischievous kind of gaming.' Public policy forbids one person who has no interest in the continuance of the life of another from speculating on that life by procuring a policy of insurance."

Although the policy under consideration in *Grigsby* v. *Russell*, *supra*, was valid when issued, and otherwise that case differed from this from a factual basis, the following language of this Court in that case is believed controlling here:

"A contract of insurance upon a life in which the insured has no interest is a pure wager that gives the insured a sinister counter-interest in having the life come to an end. And although that counter interest always exists, as early was emphasized for England in the famous case of Wainewright (Janus Weathercock), the chance that in some cases it may prove a sufficient motive for crime is greatly enhanced if the whole world of the unscrupulous are free to bet on what life they choose. The very meaning of an insurable interest is an interest in having the life continue and so one that is opposed to crime. And, what perhaps is more important, the existence of such an interest makes a roughly selected class of persons who by their general relations with the person whose life is insured are less likely than criminals at large to attempt to compass his death."

An insurable interest was defined by the late Mr. Justice Bradley of this Court in *Conn. Mutual Life Insurance Co.* v. *Schaefer*, 94 U. S., 457, 460, 24 L. Ed. 251, as follows:

"It may be said generally that any reasonable expectation of pecuniary benefit or advantage from the continued life of another creates an insurable interest in such life."

In the case of *Unity Life Insurance Company* v. *Beasley*, 64 Ga. App. 277, 13 S. E. (2d), 32, the insurance contract

was identical in every respect with the one in the instant case, providing for divisions and position numbers of the policy holders. That action was one by an individual for recovery of paid insurance premiums plus interest, to which Beasley was held entitled. That Court said:

> "This contract was an entire contract, written and continued in consideration of the payment of a *single* premium. Upon its face the endowment feature is the primary feature but whether it is primary or equally as important and vital as the life insurance feature, it is a vital part of the contract. The right of an insured to have the opportunity, for which he has paid, of receiving $1,000 during his lifetime is quite as valuable, if not more so, as to have that amount paid to a beneficiary at his death."

In view of the foregoing, it is respectfully submitted that this contract is contrary to public policy and void.

## Point Four.

**Upon the facts pleaded, property rights being involved, equity will intervene and the Court should appoint a receiver to take charge of this trust fund of well over a million dollars, now being dissipated, in order that it may be preserved and not wasted; and for the purpose of reorganization.**

It is well settled that where property rights are involved, and trust funds are threatened, equity will intervene. Equity will displace by its receiver a trustee who is guilty of maladministration of his trust.

The point is so elementary that no extended discussion is necessary; nevertheless, the interests of a large number of members are at stake, and petitioner desires to strongly emphasize his position that he is not seeking to wreck Preferred, but is endeavoring to save it from ruin at the hands

of the respondents. With this guiding principle in mind, we call to the Court's attention the following pertinent citations of authority:

A case for the appointment of a receiver is made out if it be established that there has been misconduct, waste, improper disposition of the trust estate, or mismanagement or incompetency of the trustee. *Stairley* v. *Rabe* (1840), McMul., Eq. (16 S. C. Eq.), 22; 2 Clark, Receivers (2d Ed.), 1416-1417; 4 Bogert, Trusts and Trustees, 2488; Note, 64 Am. Dec. 489.

The insurance assets of Preferred, being funds of fraternal association, constitute a trust fund for the benefit of the members at large, of which defendants are the present trustees. *McCall* v. *Grand Lodge* (1928), 217 Ala. 194, 115 So. 254; *Grand Lodge* v. *Shorter* (1929), 219 Ala. 293, 122 So. 36; *Most Worshipful Grand Lodge* v. *Callier* (1932), 224 Ala. 364, 140 So. 557; *National Circle* v. *Hines*, 88 Conn. 676, 93 Atl. 401; *Attorney General* v. *Supreme Council* (Mass.), 92 N. E. 134; *Dill* v. *Supreme Lodge* (D. C. Mo., 1915), 226 Fed. 807. But in any event, these funds were obtained by fraudulent representations in furtherance of a fraudulent scheme to enrich respondents, and respondents are, therefore, trustees *ex maleficio*. 3 Bogert, Trusts and Trustees, 1454.

In *Boesenberg* v. *Chicago Title & Trust Co.* (7 Cir., 1942), and rehearing denied June 12, 1942, 128 F. (2d) 245, the Court said:

> "Plaintiff appeals from a dismissal of his complaint, the District Court having found that jurisdiction based upon diversity of citizenship did not exist for the reason that plaintiff's interest involved less than $3,000.
> "Plaintiff sued as representative of a class great in number, all beneficiaries of a trust estate, averring that the trustees had been guilty of malfeasance, had wrongfully converted trust funds to their own use and

fraudulently paid excessive compensations to certain individuals. Plaintiff sought restraint of the trustees from further wrongful action, lodgment of the trust estate in a receiver to be appointed by the court, determination of the amount due the estate and its restorement to the fund. The sums said to have been wrongfully diverted were more than $30,000 and the entire estate consisted of property worth some $70,000. Plaintiff's proportionate interest therein is less than $3,000.

"The District Court evidently believed this to be a suit to recover the several individual amounts due plaintiff and others of the same class of which the court had no jurisdiction because of lack of the essential element of jurisdiction depending upon diversity of citizenship, in that the sum due plaintiff is less than the requisite amount.

"We think this was error. True, several claims of many against one may not be aggregated to create a sum conferring jurisdiction. *Pusey & Jones Co. v. Haussen*, 261 U. S. 491, 43 S. Ct. 454, 67 L. Ed. 763; *Lion Bonding & Surety Co. v. Karatz*, 262 U. S. 77, 43 S. Ct. 480, 67 L. Ed. 871; *Illinois Bankers' Life Ass'n. v. Farris*, (7 Cir.) 21 F. 2d 1014; *Clark v. Paul Gray, Inc.*, 306 U. S. 583, 59 S. Ct. 744, 83 L. Ed. 1001; *Robbins v. Western Automobile Ins. Co.*, (7 Cir.) 4 F. 2d 249. But such is not the case before us. Rather it is within the rule announced by this court in *Johnson* v. *Ingersoll et al.*, 63 F. 2d 86, 87. There a stockholder brought suit to protect a corporate right and the resultant common interests of all stockholders therein, the corporation having refused to take action. 'In such case, it is not necessary for the shareholder to show that his private interest or damage, actual or threatened, amounts to the sum which is required to give the federal courts jurisdiction. That jurisdiction is tested by the value of the object sought to be gained by the suit. *Fidler v. Roberts*, (7 Cir.) 41 F. 2d 305, 306; *Troy Bank* v. G. A. *Whitehead & Co.*, 222 U. S. 39, 32 S. Ct. 9, 56 L. Ed. 81; *Swan Island Club, Inc., v. Ansell*, (4 Cir.) 51 F. 2d 337; *Haynes v. Fraternal Aid*

*Union*, (D. C.) 34 F. 2d 305, 307. See, also, *Hutchinson Box Board & Paper Co. v. Van Horn*, (8 Cir.) 299 Fed. 424, 428; *Larabee v. Dolley*, C. C., 175 Fed. 365, 378; *Greenwood v. Union Freight Co.*, 105 U. S. 13, 16, 26 L. Ed. 961; *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827; *Harvey v. American Coal Co.* (7 Cir.) 50 F 2d 832; *Clay v. Field*, 138 U. S. 464, 479, 11 S. Ct. 419, 34 L. Ed. 1044; *Wheless v. St. Louis*, 180 U. S. 379, 382, 21 S. Ct. 402, 45 L. Ed. 583; Cyc. of Federal Procedure 61, 62.'

"This rule applies equally as strongly where the plaintiff is a beneficiary of a trust. *Handley v. Stutz*, 137 U. S. 366, 11 S. Ct. 117, 34 L. Ed. 706. Such was the situation in *Marion Mortgage Co. v. Edmunds*, (5 Cir. 1933) 64 F. 2d 248, 252. There plaintiff sought to recover for trust estates funds alleged to have been wrongfully diverted. The court held it immaterial whether the interest of plaintiff was worth more than $3,000 saying: 'But these interests do not fix the amount in controversy, for this bill is not a suit to recover on the bonds and certificates. There is no prayer for such a judgment, but only for a recovery by each trust of what has been taken from it, to be returned to the several trustees who are parties. It is like a stockholders' bill to enforce a corporate right which the corporate officers refuse to assert. The amount in controversy is the corporate right and not the stockholder's interest in the corporation, which latter is necessary only to justify his suing in the corporation's behalf.'

"Inasmuch therefore as plaintiff sought to have the court take jurisdiction of a trust fund aggregating more than $70,000 in value; to have restored to that fund sums aggregating some $30,000 alleged to have been wrongfully diverted and to have the estate administered in court, it is apparent that the subject of controversy was not the recovery of plaintiff's interest in the trust fund but the protection, preservation and administration of a trust estate worth far more than $3,000, under the well known powers of a court of equity. Such is a true class suit, which may be main-

tained by 'one or more' of the class, Rule 23, Rules of Civil Procedure, 28 U. S. C. A., following Section 723c; *United States v. 'Old Settlers,'* 148 U. S. 427, 13 S. Ct. 650, 37 L. Ed. 509; *Weeks v. Bareco Oil Co.*, (7 Cir.) 125 F. 2d 84. Consequently 'the issue of diversity of citizenship of the parties must be determined by the citizen status of the parties before the court.' *Irwin v. Missouri Valley Bridge & Iron Co.*, (7 Cir.) 19 F. 2d 300, 303.

"It is said, however, that, in view of the fact that within two days after the suit was begun, other beneficiaries, residents of Illinois, intervened and adopted the pleadings of plaintiff, the latter should be classed as original plaintiffs and the jurisdiction of the court defeated because of their citizenship. Whether the Court had jurisdiction is to be determined from plaintiff's complaint, which, we have seen, was sufficient. The fact that thereafter other beneficiaries were introduced into the controversy 'did not oust the jurisdiction of the court, already lawfully acquired, as between the original parties.' *Stewart v. Dunham*, 115 U. S. 61, 5 S. Ct. 1163, 1164, 29 L. Ed. 329; *Johnson v. Riverland Levee District*, (8 Cir.) 117 F. 2d 711, 134 A. L. R. 326; *Wichita Railroad & Light Co. v. Public Utilities Commission*, 260 U. S. 48, 43 S. Ct. 51, 67 L. Ed. 124; *Supreme Tribe of Ben-Hur v. Cauble*, 255 U. S. 356, at page 365, 41 S. Ct. 338, 65 L. Ed. 673. The jurisdiction of the court 'is determined as of the date when suit was begun' *Irwin v. Missouri Valley Bridge & Iron Co.*, (7 Cir.) 19 F. 2d 300; *Wichita Railroad & Light Co. v. Public Utilities Commission*, 260 U. S. 48, 43 S. Ct. 51, 67 L. Ed. 124.

"The judgment is reversed with directions to proceed in accord with this opinion."

(Petitioner has standing to ask for a receiver.) The District Court did not pass upon the points assigned in the third and fourth Specifications of Error, being apparently of the opinion that petitioner's claim for a money judgment, payment of which would be assured by reason of Pre-

ferred's solvency, barred petitioner from having any voice in the Society's management. The Court said (R. 166):

> "It is not alleged that the Society is insolvent, nor that its business is being operated at a loss. The contrary affirmatively appears from the face of the pleadings and is conceded. If the first item of relief prayed by the plaintiff, namely, a money judgment, is granted by a Court of competent jurisdiction, and that judgment is collected, as it appears it can be, then would the plaintiff be longer interested in the defendant Society, and possibly entitled to have its officers displaced or a receiver appointed?"

Much the same points were made in *Ex parte Rowley*, 20 S. E. 2d 383, at 387, where the Court said:

> "It is contended that the receivership must fall for lack of a proper action to which it is ancillary. This is based upon a misconception of the nature and form of the action which is mainly for the rescue by the court of funds constituting a trust, the insurance reserves against the policies issued by the defendant company and for a reorganization of it, in effect, a substitution of trustees. In the Powell action in the original jurisdiction of this Court, referred to hereinabove, it has been established and held that these insurance reserves are a trust fund for the benefit of the holders of current certificates of insurance. The preservation and enforcement of trusts has long been the exclusive function of equity and includes the appointment, removal and substitution of trustees (citing authorities). The appointment of a receiver was not incidental. Insolvency of the company was not necessary, • • •."

Petitioner's claim to a money judgment for fraud and deceit is an affirmation, not a rejection or recission, of his contract. *Anderson* v. *Smitley* (1910), 141 App. Div. 421, 126 N. Y. S. 25; *Churchill* v. *St. George Development Co.* (1916), 174 App. Div. 1, 160 N. Y. S. 357. Hence recovery

and payment of such judgment would neither mature nor dissolve his contract with Preferred and his rights, as a member, to a voice in the Society's affairs remain unimpaired. Any damages he might recover would be for acts occurring before he became a member and which made his insurance less valuable than represented, and in no event would the recovery of damages be a waiver of his right to object to the continuance of the same misconduct which misled him into taking insurance with Preferred.

Petitioner's claim, as a member, of the right to ask for a receiver to conserve assets cannot, in Alabama, be disputed. *McCall* v. *Grand Lodge* (1928), 217 Ala. 194, 115 So. 254, *supra; Grand Lodge* v. *Shorter* (1929), 219 Ala. 293, 122 So. 36. To the same effect is *Woodmen of the World* v. *McCue* (1931), 88 Colo. 209, 204 Pac. 947. Petitioner, then, is a proper person to ask appointment of a receiver.

(Preferred's solvency is no bar to a receivership.) Whenever it is adequately pleaded and proved that the officers and directors of a solvent, going corporation are guilty of fraud, gross mismanagement or misconduct in office, or willful oppression of the stockholders or members, a case is made out warranting the appointment of a temporary receiver for such corporation, notwithstanding its solvency and equity has inherent jurisdiction to make such appointment. Cases supporting this proposition (including numerous Alabama authorities) are so completely collected and analyzed in the excellent Annotations in 41 A. L. R. 242, 61 A. L. R. 1212, and 91 A. L. R. 665, as to make further discussion pointless.

(Petitioner has made out a case for a receivership.) In the case at bar petitioner alleges that respondents have a self-perpetuating control of the Society and that through such control and especially through the instrumentality of

an overwriting contract held by the respondent Spencer H. Longshore, the Society is managed for the exclusive benefit of respondents. Typical of their management is the incident of the adoption of this overwriting contract, which was entered into secretly, without the knowledge or consent of the then membership, by a Board of Trustees which included Mr. Longshore's wife, his brother and his associate in organizing the Society. When these allegations are taken in connection with the averments relating to the formation of First National Life Assurance Society by the respondent, W. Guy Longshore, and its operation in direct and unfair competition with Preferred; and with those charging that its lodges are dummies and its supposed fraternal nature a sham [10] no doubt remains that petitioner has adequately charged respondents with fraudulent misappropriations of assets, willful oppression of the members, gross misconduct in office and breach of trust, with every element requisite to the displacement of respondents and the appointment of a temporary receiver.

Organization of a supposedly non-profit corporation (Preferred) as a vehicle out of which it is intended to personally profit, and its actual use for such purpose, is such a heinous breach of faith with the persons who purchase insurance in such corporation and involves so much moral turpitude, that evidence of such intention and use will, without more, support a criminal conviction for fraud.

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[10] To the point that Preferred's charter and license are not conclusive that it is, in fact, a fraternal benefit society, see *White* v. *Central Dispensary and Emergency Hospital* (App. D. C., 1938), 99 F. 2d 355, 119 A. L. R. 1002 and note.

As to what is, and what is not, a fraternal benefit society, see (in addition to Secs. 8439 *et seq.* of the Alabama Code): *American Ins. Union* v. *Lowry* (5 Cir. 1932), 62 F. 2d 209; *Lange* v. *Royal Highlanders* (1905), 75 Neb. 188, 106 N. W. 224, 110 N. W. 1100, 10 L. R. A. (N. S.) 667; *Modern Order of Praetorians* v. *Bloom* (1918), 69 Okla. 219, 171 Pac. 917.

*U. S.* v. *Littlejohn*, (7 Cir., 1938) 96 F. 2d 368; *U. S.* v. *Minnee*, (7 Cir., 1939) 104 F. 2d 575. Hence it is error to refuse the appointment of a receiver *pendente lite* upon *prima facie* proof of charges remarkably similar to those here made. *Tolliver* v. *Board of Managers*, (1930) (Okla.) 286 Pac. 294. To much the same effect are *Grand Lodge* v. *Shorter*, (2d appeal, 1931) 222 Ala. 404, 132 So. 617, and *Woodmen of the World* v. *McCue*, (1931) 88 Colo. 209, 294 Pac. 947. And see *Strother* v. *McCord*, (1931) 222 Ala. 450, 132 So. 817; *Most Worshipful Grand Lodge* v. *Callier*, (1932) 224 Ala. 364, 140 So. 557, *supra*; *Carter* v. *Mitchell*, (1932) 224 Ala. 287, 142 So. 514; *Booker T. Washington Burial Ins. Co.* v. *Roberts*, (1934) 228 Ala. 206, 153 So. 409; *People* v. *Golden Rule*, (1886) 118 Ill. 419, 9 N. E. 342.

In *Grand Lodge K. P. et al.* v. *Shorter et al.*, 219 Ala. 293, 122 So. 36, 39, which was a bill in equity for the preservation and administration of an endowment fund, it being alleged, as here, that the officers of the defendant had mismanaged the fund, made personal gains therefrom, and were guilty of extravagance resulting in the depreciation of the fund, the Court held that a beneficiary of the trust fund may invoke the intervention of equity and the displacement of the trustee and transfer of the trust to the Chancery Court, basing its decision upon the proposition that where property rights are involved and trust funds are threatened, equity will intervene.

Likewise, in the case of *Toliver et al.* v. *Board of Managers*, (Okla. 1930) 286 Pac. 294, the Court held, citing *Grand Lodge K. P. et al.* v. *Shorter et al.*, *supra*, that where property rights are involved and trust funds are threatened equity will intervene.

Mr. Chief Justice Taft in *United Mine Workers of America* v. *Coronado Coal Company*, 259 U. S. 344, 66 L. Ed. 975, used the following language:

"• • • Equitable procedure, adapting itself to modern needs has grown to recognize the need of representation by one person of many, too numerous to sue or to be sued (Story, Eq. Pl. 8th Ed. 94, 97. • • •)."

The amended complaint is sufficient to warrant the appointment of a Receiver. The facts set forth in the amended complaint and interrogatories clearly show that a receiver should be appointed to take charge of and conserve the assets of the Society. One of the objects of this suit is the protection and preservation of a trust fund which is being depleted and dissipated fraudulently, to the irreparable injury of policy holders who have a property right and interest in such fund.

As was said by the Supreme Court of Alabama in a similar case (*McCall* v. *Grand Lodge Knights of Pythias*) 217 Ala. 194, at 196:

"Very clearly, a policy-holder under these circumstances has the right to invoke equity's jurisdiction for the protection of trust funds, and may maintain a bill of this character: *Howze* v. *Harrison*, 165 Ala. 150, 51 So. 614; *Jasper Land Co.* v. *Waller, etc.*, 123 Ala. 652, 26 So. 659; 1 Pom. Eq. Jur. (4th Ed.), sec. 151; *Thos. A. Edison* v. *Edison Phonograph Co.*, 52 N. J. Eq. 620, 29 A. 195; *Chicago Mut. Life Ass'n* v. *Hunt*, 127 Ill. 257, 20 N. E. 55, 2 L. R. A. 549.

"In such a proceeding the policyholder would not seek a dissolution of the order, but that a court of equity through the appointment of a receiver, to take charge to prevent a further misappropriation and waste of the trust fund and protect the same, to the end that the defendant order and endowment department might continue to function, and be carried on as a 'Going concern,' and the contracts of insurance should be upon a sound financial basis, and 'executed in their fullest integrity'."

The action of the court below is contrary to the above decision, as a receiver should be appointed of the fund which is over a million dollars (R. 108).

POINT FIVE.

**The action of the court below was contrary to the Act authorizing the New Rules of Civil Procedure and Rules of Civil Procedure 8 (e) (2), 23 (a), and 23 (b), and Rule 18.**

The Act of June 19, 1934 (c. 651, paragraphs 1, 2 (48 Stat. 1064), U. S. C., Title 28, paragraphs 723b, 723c), which authorized this court to prescribe, by general rules, for the District courts in civil actions at law, states:

> "Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant".

The substantive rights of petitioner to bring this suit have been curtailed and destroyed by the action taken by the court below in dismissing this cause, which action is based upon its harsh, rigorous, drastic and erroneous interpretation of Rule 23 of the Rules of Civil Procedure. The court below held (R. 175-176):

> "The announced purpose of the Federal Rules of Civil Procedure is to make pleadings simple and intelligible, and practice and procedure under them conducive to the speedy and sure attainment of just results, and the rules are so drawn that conformity with them will give effect to this purpose. In order to achieve the results intended by particular rules, while there should not be slavish, there should be substantial compliance with them, and a suit brought as an individual and not as a class action, without any regard to, or attempted compliance with, Rule 23, may not, in order to confer jurisdiction on the court, be construed as a class suit. The dismissal was, of course, without prejudice to the right of plaintiff to try again in the State Court or the Fed-

eral Court, as he may be advised, and whether if he tries again he might make a case under Rule 23, is not before us for decision. What the district judge decided and what we decide is only that, as brought, as an individual suit by plaintiff on his own behalf, the amount in controversy was not within the jurisdiction of the court. The judgment was right. It is affirmed."

In so holding, the court below apparently overlooked the following allegations of the petitioner:

| Amended complaint paragraph number | Record Number | |
|---|---|---|
| 8 | 136 | "This action is brought to reorganize the insurance department of defendant, Preferred Life Assurance Society, and to displace its present officers and directors and trustees * * *" |
| 18(i) | 139 | "* * * such representations constitute a fraud on plaintiff and all other members of Preferred Society." |
| 18(j) | 139 | "* * * such representations constitute a fraud on plaintiff and all other members of Preferred Society." |
| 23 | 143 | "* * * the defendants * * * operate * * * same for their own personal benefit, and not for the benefit of the members, * * *" |
| 23(a) | 143 | "* * * nor as he is informed, has any member of the Society ever received, one cent in dividends, despite the fraternal nature of the society * * *." |
| 23(d) | 143, 144 | "Defendants thus deprived plaintiff and all other members of their right and opportunity to attend lodge meetings and vote on the election of delegates and officers of the Society and deprived them of any control over the actions of such officers, * * *" |
| 23(f) | 144 | "* * * to the prejudice of Plaintiff and all other members in good health." |
| 24(c) | 144, 145 | "* * * and have defrauded plaintiff and the other members of the Society by not informing them of the true facts * * *." |
| 26 | 145 | "* * * defendants, by reasons of the fraud and wrongs which they have perpetuated upon the society and upon plaintiff and the other members of the Society * * * and preserve the funds of the same for the benefit of plaintiff and the other members of said Society * * * said judgment being for the benefit of the Society and its members, for the fraudulent and wrongful conduct of said officers, directors and trustees." |
| Prayer (4) | 146 | Prayer: "For a money judgment against each of said officers, * * * as shall be found to be justly due and owing from each of said officers, directors and trustees to the Society." |

It is respectfully submitted that the foregoing excerpts from the amended complaint filed herein clearly show that this is a class suit within the meaning of Rule 23 of the Civil Rules of Federal Procedure. Although the court below stated in its opinion that a case under Rule 23 was not made out here, yet it did not point out in what particularity in which the alleged non-compliance consisted; and it is respectfully submitted that the amended complaint fully meets the requirements of Rule 23.

Rule 8(e) permits two or more statements of a claim alternatively or hypothetically, in one count; and permits as many separate claims as exist, regardless of whether based on legal and equitable grounds, or on both.

Rule 18 permits a complaint to set forth as independent claims as many legal or equitable claims, or both, as may exist.

It is respectfully submitted that this amended complaint as filed is in accordance with the above-mentioned rules.

## Conclusion.

It would be singular indeed, if in this case, where petitioner claims damages, actual and punitive, in the sum of $200,000 (R. 145) for the benefit of the members of the Society and the Society against its officers, directors, and trustees for their fraudulent and wrongful conduct and asks for an accounting by them, (R. 146) and where petitioner has in interest in a trust fund created by the collection of over Four Million Dollars ($4,000,000) (R. 147) in premiums, that the law would require the dismissal of this suit upon the ground that the controversy does not exceed Three Thousand Dollars ($3,000).

We respectfully submit that the court has jurisdiction, and that the judgment of the United States Cir-

cuit Court of Appeals for the 5th Circuit should be reversed.

Respectfully submitted,

WARREN E. MILLER,
*Washington, D. C.;*
R. K. WISE,
*Columbia, South Carolina;*
R. T. MILNER,
*Wetumpka, Alabama;*
FRED BALL, JR.,
*Montgomery, Alabama;*
R. B. BARNES,
*Birmingham, Alabama;*
W. H. BRANTLEY, JR.,
*Birmingham, Alabama,*
*Attorneys for Petitioner.*

## APPENDIX.

### Statutes.

Title 28 Sec. 41, U. S. C. A. confers jurisdiction of all suits of a civil nature upon the U. S. District Courts:

> "* * * where the matter in controversy exceeds exclusive of interest and costs, the sum or value of $3,000, and * * * is between citizens of different states."

Title 28 U. S. C. A. Sec. 80 provides:

> "* * * if in any suit commenced in a District Court, or removed from a State Court to a District Court of the U. S., it shall appear to the satisfaction of the said District Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said District Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said District Court shall proceed no further therein, but shall dismiss the suit or remand it to the Court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

Alabama Statutes, Title 28, Paragraph 167 (8439) provides:

> "*Fraternal benefit societies defined.*—Any corporation, society, order or voluntary association, without capital stock, organized and carried on solely for the mutual benefit of its members and their beneficiaries, and not for profit, and having a lodge system with ritualistic form of work and representative form of government, and which shall make provision for the payment of benefits in accordance with section 174 of this title, is hereby declared to be a fraternal benefit society."

Alabama Statutes, Title 28, Paragraph 168 (8440) provides:

"*Lodge system defined.*—Any society having a supreme governing or legislative body and subordinate lodges or branches by whatever name known, into which members are elected, initiated and admittted in accordance with its constitution, laws, rules, regulations and prescribed ritualistic ceremonies, which subordinate lodges or branches shall be required by the laws of such society to hold regular or stated meetings at least once in each month, shall be deemed to be operating on the lodge system, and providing members may be admitted within twelve months from date of issuance of certificate according to the rules and regulations of the society. (Ib.; 1931, p. 71.)"

Alabama Statutes, Ttitle 28, Paragraph 169 (8441) provides:

"*Representative form of government defined.*—Any society shall be deemed to have a representative form of government when it shall provide in its constitution and laws for a supreme legislative or governing body composed of representatives elected either by the members or by delegates elected directly or indirectly by the members, together with such other members as may be prescribed by its constitution and laws; provided, that the elective members shall constitute a majority in number and not less than the number of votes required to amend its constitution and laws; and provided further, that the meetings of the supreme or governing body, and the election of officers, representatives or delegates shall be held as often as once in four calendar years. No member under age sixteen shall have voice or vote in the management of the society. No member, officer, representative or delegate shall vote by proxy. (Ib.)"

Alabama Statutes, Title 28, Paragraph 172 (8444) provides:

"*Extended or paid-up protection granted.*—Any society which shall show by the annual valuation hereinafter

provided for that it is accumulating and maintaining the reserve necessary to enable it to do so, under a table of mortality not lower than the American experience table and four per cent interest, may grant to its members extended and paid-up protection or such withdrawal equities as its constitution and laws may provide; but such grant shall in no case exceed in value the portion of the reserve to the credit of such members to whom they are made. (1911, p. 700.)"

Alabama Statutes, Title 28, Paragraph 212 (8485) provides:

"*Additional contributions; how made.*—The by-laws of such society shall provide that if the stated periodical contributions of the members are insufficient to pay all matured death and disability claims in full and to provide for the creation and maintenance of the funds required by its by-laws, additional, increased or extra rates of contribution shall be collected from the members to meet such deficiency; and such by-laws may provide that, upon the written application or consent of the member, his certificate may be charged with its proportion of any deficiency disclosed by valuation, with interest not exceeding five percent per annum. (1911, p. 700.)"

**Excerpt From Certificate of Incorporation—Objects and Purpose of Society.**

Certificate of Incorporation recorded in the Office of the Probate Court, Montgomery, Alabama, August 28, 1928, shows the objects and purpose of the Society as follows (R-140):

"The object and purpose of the corporation are to form a fraternal benefit society, without capital stock, to be organized and carried on for the mutual benefit of its members and not for a profit and having a ritualistic form of work and a representative form of government, and to make provision for the payment of benefits in accordance with the laws governing fraternal

benefit societies. In addition to the payment of death benefits, the society will also pay benefits to the oldest member of each group in which death occurs, contingent upon mortality experience in such group, such benefits based on a reserve that shall be established and maintained upon a basis of not lower than the American Experience Table of Mortality with one year preliminary term and interest assumption at four per cent.

"Other objects of this Society are to unite in bonds of fraternalism and benevolence, all acceptable persons of good moral character and sound bodily health and who believe in the existence of a Supreme Being, to educate and (fol. 174) improve its members, morally, socially and intellectually and to furnish insurance protection and benefit upon the lives of such of its members as may be entitled thereto under the laws, rules and regulations of the society, for themselves and their beneficiaries as defined by law, as the member may direct to insure and protect and benefit, in the event of loss by death, accident, sickness or other disability, old age or other causes; also to accumulate, maintain, apply, disburse among its members a reserve, emergency, endowment or other fund as may be provided in its law, rules and regulations."